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## The Modern Law of Assumpsit

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## BOOK REVIEW

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**THE MODERN LAW OF ASSUMPSIT.** By Warren B. Kittle, LL.B.,  
Judge of the Nineteenth Judicial Circuit of West Virginia.  
Powhatan Point, Ohio: John K. Goodhue. 1917. pp. 879.

The author of this book is already well and favorably known throughout the State as author of "The Law of Rule Days." In the book here reviewed he has made another valuable contribution to the law of pleading, practice and procedure in Virginia and West Virginia.

The book is substantially bound and printed on good paper in clear and attractive type with a liberal margin to the page. The contents, exclusive of the table of contents, table of cases and index, comprise 732 pages, approximately 250 of which are given to forms, leaving 482 pages of text and foot-notes. The text, with forms intermingled, is divided into 23 chapters, dealing in chronological order and in detail with the inception, progress and conclusion of actions in assumpsit, including prerequisites for writs of error.

Chapter I (pp. 63-106), dealing with "Parties to Action," and Chapter II (pp. 108-146), entitled "The Process," present their respective subjects in an especially practical and comprehensive manner, and, it is believed, supply a real need in this respect in West Virginia. Chapter III (pp. 147-156), "History of Assumpsit," recognizing the fact that it is impossible to get a true view of a common-law form of action except in the light of historical development, vividly traces the evolution of the action of assumpsit through the metamorphosis from its delictual beginning to its ultimate expansion into the field of implied assumpsit, resulting finally in the broad remedy of modern assumpsit. Chapter IV (pp. 158-197), entitled "Modern Assumpsit," discusses statutory changes in Virginia and West Virginia, analyzes the declaration in assumpsit and dwells upon the essential and formal allegations in the assumpsit count. Chapter V (pp. 200-206), "General and Special Assumpsit," differentiates the two different classes of assumpsit and explains in what instances they are concurrent. Chap-

ter VI (pp. 207-238), "General Assumpsit," is a full discussion of the common counts and an exhaustive illustration of their application, accompanied by forms. Chapter VII (pp. 239-265), entitled "Forms in General Assumpsit," is concerned chiefly with forms, but concludes with a discussion of bills of particulars and instances of their necessity. Chapter VIII (pp. 266-286), "Special Assumpsit," is to a certain extent a repetition of Chapter IV, but more particularly defines the requirements of pleading as based upon the express promise. Chapter IX (pp. 286-436), "Special Assumpsit—Continued," is confined almost exclusively to a great variety of forms, with brief commentaries thereon by way of interpolation. Chapter X (pp. 437-458), "Damages," is a broad, practical commentary upon the proper measure of damages in the various phases of assumpsit, more especially in special assumpsit, distinguishing particularly between the different applications of the rule in actions *ex contractu* and in actions *ex delicto*. This chapter should be of particular aid to those concerned with election of remedies, where the election is between the express or implied promise and common-law duty. Chapter XI (pp. 459-484), "Proceedings Before Trial," treats of default judgments, writs of inquiry, judgments by confession, *nil dicit* and *non prosequitur*, tender, and payment into court, with forms. Chapter XII (pp. 485-518), "Defenses," beginning this general subject with the demurrer, continues and concludes with multiple pleas, motion in arrest of judgment, cure by verdict, the statutes of jeofails, etc., emphasizing the various applications of all these trial incidentals. Chapter XIII (pp. 519-548) continues "Defenses," under "Dilatory Pleas," giving the conventional order of pleading dilatory defenses, distinguishing and emphasizing formal necessities still peculiarly important as applied to dilatory pleas, and concludes with forms. Chapter XIV (pp. 549-558) continues "Defenses," under "Pleas in Bar," defining the scope of the general issue, enumerating the few instances wherein special pleas in bar are necessary, and indicating the broad field of election between the two different modes of pleading. The advantages or disadvantages of pleading the one way or the other, where an election is allowed, are explained. Chapter XV (pp. 559-576), a continuation of "Defenses," deals with set-off, recoupment and payment, particularly by way of differentiation of these three analogous classes of defenses, applying statutory provisions and concluding with a lib-

eral variety of forms. Chapter XVI (pp. 577-593), "Defenses" continued, explains equitable set-off in its historical, common-law and statutory aspects, with forms. Chapter XVII (pp. 594-625), "Defenses" continued, is an exhaustive discussion of the statute of limitations as pertaining to the action of assumpsit, including practical suggestions as to the inception and suspension of operation of the statute, its application to sets-off, the proper mode of pleading a "new promise," etc. Chapter XVIII (pp. 626-638), "Defenses" continued, discusses bankruptcy, usury and gaming contracts, giving forms. Chapter XIX (pp. 638-655) applies the general subject of "Defenses" to the statute of frauds, duress, *non est factum* (which, although at common law peculiar to debt and covenant, the author considers applicable to assumpsit on sealed instruments by virtue of the statute) and release. Forms are interspersed. Chapter XX (pp. 656-670), "Defenses" continued, is an intermingling of discussion and forms pertaining to accord and satisfaction, arbitration and award, and former judgment recovered. Chapter XXI (pp. 670-686), concludes the subject of "Defenses" with forms pertaining to estoppel, *plene administravit*, release of surety, infancy and coverture, interspersed with informal comments. Chapter XXII (pp. 687-703) is a helpful exposition of the law of continuances, with forms of affidavits. Chapter XXIII (pp. 704-794), under the title of "Trials," goes extensively and practically into matters pertaining to selection and qualification of the jury, production of evidence, instructions to the jury, kinds and requisites of verdicts, judgments, grounds and motions for new trial, prerequisites for writs of error, suspension of judgment, etc., with forms where necessary.

The author states in his preface that he has selected Assumpsit as the subject of his text because it is the most comprehensive of the forms of action *ex contractu*, and because he believes that it is destined to supersede all other forms of action on the contract, but the analysis given above is ample evidence that the usefulness of his book is by no means confined to the field of assumpsit. Particularly is the latter assertion true of those chapters dealing with parties, process, continuances, trial, and other matters of general procedure. The book might very appropriately have been entitled "The Law of Pleading, Practice and Procedure in Virginia and West Virginia as Exemplified in the Action of Assumpsit."

The text is peculiarly one for Virginia and West Virginia, most

of the cases cited coming from those jurisdictions. Since the common law of assumpsit is fairly well illustrated by the decisions of these two common-law states—how well, in fact, is one of the first impressions gained from reading Judge Kittle's book—the book will by no means be found without value in other jurisdictions where the common law prevails. The text is supported by frequent citations to sources of the highest repute, as the foot-note citations and the formidable "list of publications cited" will show.

The author's style is admirable in its simplicity, and will be recognized as peculiarly his own by those who are familiar with his work on rule days. It is believed that he has realized his avowed intention to make the book practical. His method of historical explanation, his detailed attention to numerous matters an understanding of which has been unfortunately assumed by many writers, his appreciation of logical sequence, and his methodical interweaving of pleading and procedure,—all these things taken together, make his work of particular value to students and no less practical in the law office. It is believed that he has succeeded as well as the average investigator in making his citations sustain the burden cast upon them.

In his forms, a superficial examination shows that he has taken unusual care to distinguish between essentials and mere formal survivals which have been carried over in the evolutionary process from past ages of technicality and fictional adaptation. In this respect, his tendency is toward simplicity. In many instances, authorities and precedents are cited in support of forms; but where necessity demands, lack of authority or precedent has not discouraged him from asserting his originality.

A hasty examination of the text suggests a few examples of seeming error or assertions that might bear qualification. On pages 126-7, the author, citing the Code of 1913, failed to note the change made by Acts of 1915 in § 24a (1), c. 54, W. Va. Code, in regard to appointment of the auditor as attorney in fact to accept service of process on behalf of foreign and non-resident domestic corporations. Perhaps the statement (p. 94) that a conveyance by a married woman to her husband is void should have been qualified by alluding to the equitable status of such a conveyance. *Carrico v. Railroad Co.*, 35 W. Va. 389, 14 S. E. 12, is cited (p. 742) in support of the "scintilla of evidence" rule as applied to a motion to exclude evidence. It should be noted that the latter

case, so far as it supports such application of the rule, has been repudiated more than once in later decisions, *e. g.*, *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683, and *Ice v. County Court*, 88 S. E. 75 (W. Va. 1916). The assertion on page 743 that a demurrer to the evidence is made orally, while true in the sense likely intended, should be compared with the subsequent case of *Ashley v. Lumber Co.*, 91 S. E. 813 (W. Va. 1917). On page 761, an unqualified assertion is made that a motion to set aside a verdict must specify grounds. To the effect that such an assertion, for all purposes, may be too broad, see *Hinton Milling Co. v. New River Milling Co.*, 88 S. E. 1079 (W. Va. 1916). The statements (pp. 266, 285) to the effect that in *all* instances of assumpsit the plaintiff, at his election, may declare in special assumpsit, if taken literally, are difficult to understand. In fact, these statements do not seem to be supported by the authorities cited and furthermore seem to be contradicted by the author himself near the bottom of page 267.

The author has not dealt with proceedings at rules in his present volume, no doubt because he has already treated this subject so practically and exhaustively in "The Law of Rule Days." Perhaps we may be yearning for the unattainable, but we cannot help regretting that the author did not more definitely point out the status of married women as parties in West Virginia. It is suggested, also, that another task pertaining to West Virginia pleading and practice remains to be performed, a statutory labyrinth yet to be explored, which might very well have been accomplished in Judge Kittle's book in treating fully and definitely the law of venue and process pertaining to corporations in West Virginia. In this respect, he has given us little that has not gone before, and that is not enough. On the other hand, in some instances, *e. g.*, in dealing with analysis of the declaration, it is believed that the author, in his effort to seek perfect clarity, may have been guilty of some unnecessary repetition.

It is unusual when a sincere review of any book may be confined exclusively to eulogy. In the opinion of the reviewer, the author's unstinted efforts could have been made productive of more satisfactory results had more precise attention been given to a few particular details. In a book of such merit, it is to be regretted that its usefulness should be hampered by failure to give sufficient attention to the matter of citations. Since the Reporter

System has largely supplanted the state reports in many law offices, it is unfortunate that in most instances the Reporter citations have been omitted. They would have been useful to those using the book both within and without West Virginia. It is also to be regretted that many late cases are cited solely in the Reporter System, without reference to the state from which they come although the official citations were available. The reviewer also believes it unfortunate that the citations of statutes have been made only to the serial number of the West Virginia Code of 1913, and not to the particular chapter and section. The Virginia Code has only the serial number, but as to the West Virginia Code both methods of citation might have been used. The latter criticism is particularly applicable because a serial section reference to the Code of 1913 can only be found in the Barnes' Code through the use of the latter's parallel reference table. It is believed that most lawyers remember, and are familiar with chapter citations rather than serial numbers, which are confusing in their continuity. It is also unfortunate that a few instances of substitution of words and occasional slips in diction, due to the exigencies of dictation, have inadvertently crept into the text, to mar at times a style and diction otherwise so admirable. These minor faults are regrettable even though they are largely self-corrective and do not seriously harm the usefulness and general excellence of a book which is a valuable contribution to the literature of our adjective law. Its particular virtues far outweigh its small sins. The *Modern Law of Assumpsit* should be read by every student of law in the Virginias and should find a place in the office of every practitioner in both Virginia and West Virginia. In this book, Judge Kittle has rendered valuable service to the legal profession of West Virginia and Virginia.

—L. C.